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SUPREME COURT, U.S.

No. 06-529

In the Supreme Court of the United States

DOROTHY JONES, as personal representative of the estate of Denise Michelle Jones, deceased,
Petitioner,

v.

WILLIAM KISH, III; Joseph Lavis; Douglas Muncey; and Mohamed Nasser,
Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Has Petitioner shown compelling reasons for review where, contrary to her assertions, she has failed to demonstrate a conflict between the circuits or any question requiring Supreme Court consideration?

II. Has Petitioner shown compelling reasons for review where, regardless of the resolution of the questions she has presented, she cannot prevail as she has ignored other requisites for application of the "danger creation" exception in the Sixth Circuit?

III. Has Petitioner shown compelling reasons for review where, regardless of the resolution of the questions she has presented, she cannot prevail as she has ignored respondents' defenses of qualified immunity (by failing to address the question of "clearly established law") and res judicata?

IV. Has Petitioner shown compelling reasons for review where she is presenting new theories of liability which were not presented or preserved in the courts below?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The City of Lincoln Park, Aaron Reynolds, and Mustapha Atat, were each named as defendants in the district court, and the City of Lincoln Park was also a named appellee in the circuit court. Petitioner has not included these parties in the pending Petition.

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BRIEF IN OPPOSITION

SUMMARY OF REASONS TO DENY THE PETITION

In order to prevail on her 42 U.S.C. §1983 claim, it was necessary for petitioner to identify a relevant constitutional right that was clearly established on October 8, 2001, the date she was injured while observing a drag race. The Sixth Circuit held that she was unable to satisfy the requisites of a §1983 claim, and unable to avoid the respondents' qualified immunity from suit. Yet, seeking review from this Court, petitioner attempts to shift her theory of liability from the "danger creation" theory advanced in her Complaint and addressed by the district and circuit courts, to a "direct injury" theory raised for the first time to this Court, while she ignores her burden to demonstrate the existence of a clearly established constitutional right under either theory. She also ignores respondents' defense of res judicata and the consequences of the final judgment entered in a state proceeding instituted by petitioner seeking redress for the same injury and the same conduct she complaints of in this case. Thus, and regardless of the merits of the arguments now advanced by petitioner, she cannot prevail and her Petition should be denied. Moreover, petitioner's claim is properly analyzed pursuant to the dictates of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), and the Sixth Circuit properly applied both *DeShaney* and its own precedent when it held, *inter alia*, that respondents' conduct did not constitute an affirmative act that had either created or increased the risk to which petitioner was exposed as an observer of a drag race.

Contrary to petitioner's assertions, precedent from other circuits, including the Second, Fourth and Ninth Circuits, is consistent with the reasoning advanced by the Sixth Circuit, and the tests applied by those circuits who have adopted a "danger creation" exception to the general rule enunciated in *DeShaney* are consistent with the test applied by the Sixth Circuit. Premised on the language of *DeShaney*, the conduct of the state actor must either create a new danger, or increase an existing danger, and petitioner had alleged no conduct that satisfies this requirement.

As Petitioner has failed to suggest compelling reasons to support the granting of her Petition, it should be denied.

STATEMENT OF THE CASE

During the early morning hours of October 8, 2001, Denise Jones was among a crowd of persons observing a drag race taking place in the City of Detroit, on the border of Detroit and the City of Lincoln Park, when the driver of one of the vehicles, Aaron Reynolds, lost control of his vehicle and struck Ms Jones. Respondents, William Kish, III, Joseph Lavis, Douglas Muncey and Mohamed Nasser, were police officers employed by the City of Lincoln Park who were present during the race.[1] On May 8, 2003, petitioner, Dorothy Jones, as Personal Representative of the Estate of Denise Michelle Jones, deceased, commenced this litigation in the United States District Court for the Eastern District of

[1] A detailed recitation of the underlying facts, taken in the light most favorable to petitioner, is set forth in the Sixth Circuit opinion. Pet. App. 2, *et seq.*

Michigan. Ct. App. JA 18. Petitioner sought to impose liability on respondents under 42 U.S.C. §§ 1983 and 1985 for fatal injuries suffered by Denise Jones when she was struck by a vehicle engaged in an illegal drag race on the public street. She complained that the respondents were police officers who were present during the drag race, but who failed to take any steps to stop it, and approved and encouraged it. Count I, entitled "Conspiracy", complained that the respondent police officers conspired with the drivers, Aaron Reynolds and Mustapha Atat, to violate Michigan's drag race statute, M.C.L. 257.626a, and that they did so for the purpose of depriving persons of the equal protection of the law in violation of 42 U.S.C. §1985(3). Ct. App. JA 27. Count II asserted a cause of action under 42 U.S.C. §1983, and alleged that the actions of the respondents violated Denise Jones' rights under the Fourth and Fourteenth Amendments. Ct. App. JA 29. Count III asserted a cause of action under 42 U.S.C. §1983 against the City of Lincoln Park. Ct. App. JA 32. In response to this Complaint, respondents filed an Answer and Affirmative Defenses which included, *inter alia*, the affirmative defenses of qualified immunity and res judicata. Ct. App. JA 108.

Prior to the commencement of this federal action, on December 20, 2001, petitioner had also commenced suit in Wayne County Circuit Court, seeking to impose liability for Denise Jones' death on respondents, premised on causes of action allegedly arising under Michigan law. Ct. App. JA 161. A final judgment was entered in the state action on August 8, 2003, and petitioner appealed that judgment to the Michigan Court of Appeals, which affirmed the judgment on April 7, 2005, in Case #250616. Res. App. A at 1a. Petitioner's motion for reconsideration was denied by the Michigan Court of Appeals on June 17, 2005, and her Application for Leave to Appeal to the Michigan Supreme

Court was denied in Case #129133 on February 27, 2006. Res. App. B at 35a, Res. App. C at 36a.

In this federal action, respondents sought summary judgment in the district court on the bases that, taking the evidence in the light most favorable to petitioner, there was no genuine issue of material fact that petitioner's claims failed to implicate the deprivation of any constitutional right, that respondents were entitled to qualified immunity from suit as to any arguably implicated constitutional right, and that this litigation was barred by the doctrine of res judicata. Ct. App. JA 372. This motion was granted in an opinion released on September 17, 2004. Ct. App. JA 43. The district court held that petitioner had failed to establish the requisites for a cause of action under 42 U.S.C. §1985 because of the absence of any proof of class-based animus. Ct. App. JA 53-55. As to petitioner's claim under 42 U.S.C. §1983, the district court held inapplicable the "state created danger" exception to the general rule set forth in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), as recognized by the Sixth Circuit Court of Appeals in, for example, *Cartwright v. City of Marine City*, 336 F.3d 487 (6th Cir. 2003), and *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998). As petitioner had not shown that respondents had engaged in unconstitutional conduct, she had failed to overcome the first inquiry into the respondents' assertion of qualified immunity.

The judgment of the district court was affirmed on petitioner's appeal, and her motion for a rehearing en banc was denied. Pet. App. 1, 71. Citing *DeShaney, supra.*, the Court summarized: "Because the officers did not have custody of Denise Jones at the time of the accident, because the officers' actions did not place Denise Jones in any more danger than she voluntarily undertook before they arrived and

because the officers' participation in this tragedy did not specially place Denise Jones at any more risk than the 150-300 people attending the drag race, all relevant precedent requires us to uphold the judgment of the district court summarily rejecting this constitutional claim." Pet. App. 2-3. Further addressing the respondents' claim of qualified immunity, the Court held that petitioner had failed to demonstrate a violation of 'clearly established' constitutional rights. Pet. App. 23.

Petitioner does not address the issue of "clearly established" law in her Petition, beyond her conclusory assertion in the Statement of Facts that the respondents would not be entitled to qualified immunity, asserting that "[t]his case involves the abuse of authority." Pet. at 4.[2] Nor is respondents' affirmative defense of res judicata addressed by petitioner, although this defense was presented to the Sixth Circuit for its consideration.

Moreover, notwithstanding Petitioner's apparent desire to change her theory of liability, as evidenced by her assertions that she "does not claim the Respondent police officers had a duty to protect her under the Fourteenth Amendment" (Pet. at 6-7), and that she "has never claimed the police officers failed to protect her or the Constitution creates a duty to protect" (Pet. at 8), her Complaint relied on a failure to protect theory to support her §1983 claim. It alleged that "[e]ach Defendant had the duty and the opportunity to protect the decedent from the unlawful actions of the other Defendant but each Defendant failed and refused to perform such duty,

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[2] Thus, she has failed to sustain her burden of overcoming respondents' qualified immunity. *Brousseau v. Hagen*, 543 U.S. 194 (2004); *Saucier v. Katz*, 533 U.S. 194 (2001).

thereby proximately causing the decedent's death and Plaintiff's injuries." Ct. App. JA 20, ¶13. It further alleged that the respondents "failed to use their police vehicle to prevent the drag race from taking place by driving through the stretch of road or flashing their lights, or even using the public address system to warn the drag race participants, instead of blaring rap music, 'Everybody Should Be Living It Up', to parade and cheer for the event to occur." Ct. App. JA 24, ¶42. Further, and of particular note, the issue raised against respondents by petitioner before the Sixth Circuit Court of Appeals, as stated in her Appellant's Brief, page 1, was "[w]hether Plaintiff was entitled to summary judgment or jury question for Fourteenth Amendment substantive due process claim that state actors created danger, in violation of 42 U.S.C. 1983, which resulted in death of decedent, where Defendants stipulated to Plaintiff's facts."

Accordingly, the Petition ignores issues raised below which are critical to petitioner's position, such as the existence of "clearly established" law, while advancing theories which were previously neither pled nor argued.

REASONS FOR DENYING THE PETITION

Petitioner questions the Sixth Circuit's analysis of her Fourteenth Amendment substantive due process claim, and specifically its conclusion that the principles enunciated in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) supported the dismissal of her claim. In *DeShaney, supra.*, the Court rejected the plaintiff's argument that Joshua DeShaney's Fourteenth Amendment due process rights had been violated by the State when it failed to protect him against his father's violence. In so holding, the

Court observed that the due process clause was "phrased as a limitation on the State's power to act, not as a guarantee of certain minimum levels of safety and security"; that the clause "generally confer[red] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual"; and that "[i]f the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them." *DeShaney,* 489 U.S., 195, 196-197. The *DeShaney* Court did recognize that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals" (489 U.S., 198), but explained that these circumstances involved situations where the State had either actual or functional custody of the plaintiff, thereby preventing him from taking action to protect himself (489 U.S., 200).

Petitioner has never contended that this case falls within this "custody" exception but, rather, has relied on a "creation of danger" exception, derived wholly from the *DeShaney* Court's statement that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." 489 U.S., 201. Premised on these few words, the Sixth Circuit has recognized an exception to the general rule enunciated in *DeShaney*, applicable only where the State has either created the danger itself or, where, by its actions, it has placed a plaintiff in a position worse than she would have been in had there been no State action at all. *Bukowski v. City of Akron*, 326 F.3d 702 (6th Cir. 2003); *Cartwright v. City of Marine City*, 336 F.3d 487 (6th Cir.

2003).[3] In the case at bar, the Sixth Circuit applied this precedent, including the three-part test enunciated in *Cartwright, supra.*, 336 F.3d, 493:

> To show a state-created danger, plaintiff must show: 1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; 2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as

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[3] Other Circuits have also adopted variations of this "state created danger" exception. For example, in *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062-1064 (9th Cir. 2006), the Ninth Circuit noted that it had first recognized "danger creation liability" in *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), which liability included the requirement that the state actors have placed the plaintiff in danger that she would not otherwise have faced. Similarly, in *Windle v. City of Marion*, 321 F.3d 658, 661-662 (7th Cir. 2003), the Seventh Circuit discussed the "state created danger exception" and its requirement of an affirmative act that created or increased the danger faced by the plaintiff. In *Davis v. Fulton County*, 90 F.3d 1346, 1351 (8th Cir. 1996), the Eighth Circuit noted that it had recognized a duty to protect "when the state affirmatively places a particularized individual in a position of danger that she would not otherwise have faced." In *Morse v. Lower Merion School District*, 132 F.3d 902, 908 (3rd Cir. 1997), the Third Circuit expressed its four-part test, which included the requirement that the state actors have used their authority to create an opportunity for crime that would not otherwise have occurred. In *Ruiz v. McDonnell*, 299 F.3d 1173, 1182-1183 (10th Cir. 2002), the Tenth Circuit noted its six-part test for satisfying the danger creation exception, including the requirements that the state actors created or increased the plaintiff's vulnerability to the danger, and that the plaintiff be a member of a limited and specifically definable group.

> distinguished from a risk that affects the public at large; and 3) the state knew or should have known that its actions specifically endangered the plaintiff. * * *

The court below held that these requirements could not be satisfied in the circumstances of this case. As to the first requirement (the only one that petitioner addresses), the court concluded that allegations directed against respondents did not constitute an affirmative act that either created or increased the risk to Denise Jones because, although respondents could have prevented the race from taking place, "[n]o evidence indicates that the drag race would not have proceeded had the officers never arrived, and no evidence indicates that the officers' actions, whether characterized as allowing the race to proceed or as encouraging it, increased the risk to spectators at the race in general or to Jones in particular." Pet. App. 12. "'The question is not whether the victim was safer *during* the state action, but whether [she] was safer *before* the state action than [she] was *after* it.'" Pet. App. 11-12. This analysis is wholly consistent with the observation in *DeShaney, supra.*, 489 U.S., 201: "That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been in had it not acted at all." In the case at bar, Denise Jones was in no worse position than if the respondents had not acted at all because, in either case, the drag race would have occurred. This is not a situation where the race had already been called off before the officers arrived. Had there been no state action at all, if the officers had never appeared, it is indisputable that there would still have been a race.

The Sixth Circuit also held that since Denise Jones was not specifically at risk, the second requisite for application of the state created danger exception was not satisfied. As noted

by the Court, "[a] special danger exists 'where the state's actions place the victim specifically at risk, as distinguished from a risk that affects the public at large.'" Pet. App. 20. The court noted that there were at least 150 persons observing the race, that respondents had never interacted with Denise Jones, and that there was no evidence that respondents "had any reason to know that they were putting her at risk by their action/inaction that night." Pet. App. 22.

Petitioner has asked this Court to consider the Sixth Circuit's opinion, principally complaining that it should have considered respondents' conduct as satisfying the requirement for "affirmative state action," but without explaining how she could overcome the other deficiencies in her claim.

I. The question of Sixth Circuit application of its own precedent does not warrant Supreme Court review.

Petitioner does not question the propriety of the danger creation exception as formulated by the Sixth Circuit in *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998), *Bukowski v. City of Akron*, 326 F.3d 702 (6th Cir. 2003) and *Cartwright v. City of Marine City*, 336 F.3d 487 (6th Cir. 2003). Rather, she complains that the Court did not properly apply that precedent in this case when it failed to recognize the respondents' conduct as "affirmative state action." This question was not deemed to merit an *en banc* review by the Sixth Circuit, and it does not raise a compelling issue requiring Supreme Court review.

II. Regardless of the Answers to the Questions Presented in the Petition, Petitioner Cannot Prevail.

A. The Petition focuses on only one phrase utilized in the first of a three-part test required for application of the "danger creation" exception.

While petitioner focuses her attention on the meaning of "affirmative state action" as used when assessing danger creation liability, the critical question pertains less to the characterization of the conduct as "affirmative," and more to the question whether that conduct caused or increased the danger. As noted by the Sixth Circuit, when discussing the requisite of an affirmative act: "Whether the conduct of the government officials in some cases should be treated as a failure to act or as action 'may be a difficult question in the abstract,'. . . but we have always treated governmental conduct as 'fall[ing] on the inaction side of the line,' . . . when it does not create or increase the risk of peril posed by the private actor. . . . [W]hen state action or inaction 'neither increase[s] decedent's risk of harm nor render[s] her more vulnerable,' . . . the plaintiff cannot establish a cognizable 'affirmative act'." [citations omitted] Pet. App. 10-11. Plaintiff does not meaningfully address this critical question, other than to suggest that the conduct of the private parties, Reynolds and Atat, should be imputed to respondents.[4]

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[4] There was no desire by either the public or private actors to deprive petitioner of her constitutional rights, and petitioner's allegations of conspiracy and concert of action may not be used to transform the circumstances of this case into a constitutional tort. Petitioner has complained below that the respondents' conduct constituted a violation of Michigan's drag racing statute, M.C.L. 257.626a, which renders drag racing a violation of the Motor

Indeed, petitioner's complaint that the Sixth Circuit relied on an "assumption of risk" analysis misreads the import of the court's analysis. It is undisputed that Denise Jones was voluntarily present at the drag race, and there is no evidence that her presence was related to the presence of the officers. Accordingly, it is impossible on this record to conclude that it was the conduct of the respondents that exposed her to the dangers attendant to her voluntary presence at the drag race.

Nor does petitioner address the second and third tests articulated in Sixth Circuit precedent, which require both the showing of "a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large," as well as a showing that "the state knew or should have known

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Vehicle Code. However, even were petitioner's interpretation of Michigan law correct, 42 U.S.C. §1983 provides a remedy for the violation of rights created by federal law, and the violation of state statutory or common law does not give rise to a cause of action under §1983 unless the conduct which violates state law also implicates federal rights. *Collins v. City of Harker Heights*, 503 U.S. 115, 119 (1992). Allegations of a conspiracy to violate a state statute do not state a claim under §1983. As stated by the 10th Circuit in *Dixon v. City of Lawton*, 898 F.2d 1443, 1449 (10th Cir. 1990), ". . . in addition to proving an agreement, plaintiff was required to prove an actual deprivation of a right 'secured by the Constitution and laws.' . . . This is because the essence of a §1983 claim is the deprivation of the right rather than the conspiracy." The complained of agreement must be one intended to violate another's constitutional right and not simply an agreement to act together in some fashion. An agreement to allow, encourage, or even participate in a drag race on the public streets would not constitute a conspiracy to violate someone's constitutional rights because drag racing is not, itself, constitutionally tortious, and there was no intent or agreement to injure another.

that its actions specifically endangered the plaintiff." The Sixth Circuit concluded that the record failed to support either of these requisites which, standing alone, supported the dismissal of petitioner's §1983 claim. Petitioner's failure to address these issues also support the denial of her pending Petition.

B. The Petition does not address the existence of the "clearly established law" required to overcome respondents' qualified immunity.

Even when a relevant constitutional right is implicated by a plaintiff's allegations, government officials sued pursuant to 42 U.S.C. §1983 are entitled to a dismissal pursuant to the doctrine of qualified immunity unless the plaintiff is able to demonstrate that the right was clearly established at the time of its alleged deprivation. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Saucier v. Katz*, 533 U.S. 194 (2001); *Brousseau v. Hagen*, 543 U.S. 194 (2004).[5] The Sixth Circuit held that petitioner was unable to do so in this case.

> Even if there were doubt about these conclusions, it is clear at a minimum that Jones has not shown a violation of constitutional rights that were 'clearly established' at the time of the officers' action/inaction. No authority from our circuit extant at the time of the

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[5] In *Brousseau, supra.*, 543 U.S., 599, the Court explained that "[i]f the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation." Moreover, quoting from *Saucier, supra.*, 533 U.S., 201, the *Brousseau* Court reiterated, 543 U.S., 599, "[i]t is important to emphasize that this inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'"

> incident even begins to suggest that the 150 people at the drag race would satisfy the "special danger" requirement. And no authority from our circuit supports the theory that the officers committed a cognizable affirmative act when they did not create or increase the danger to Denise Jones that she voluntarily undertook before they arrived.

Pet. App. 23. Yet, petitioner has neither presented the question of "clearly established law" as a Question Presented on her Petition, nor developed any reasoned argument concerning it. Accordingly, even if this Court were to determine that the circumstances of this case implicated a substantive due process violation, respondents would be entitled to summary judgment premised on their qualified immunity because that right was not clearly established on October 8, 2001, and, as the Sixth Circuit held, petitioner failed to sustain her burden of demonstrating otherwise.

C. The Petition does not address respondents' asserted res judicata defense.

On December 20, 2001, petitioner brought a state court action against respondents, asserting claims based on the same underlying facts and conduct she alleged in this case. Ct. App. JA 161. That state litigation resulted in a final judgment on August 8, 2003, which judgment was affirmed on appeal. Res. App. A at 1a. Thus, in their motion for summary judgment, respondents argued that even were petitioner otherwise able to proceed with her federal claim, it was barred by the doctrine of res judicata, which precludes a party from splitting her cause of action and bars subsequent relitigation based on the same transaction or event. *Pierson Sand and Gravel, Inc. v. Keeler Brass Co*, 460 Mich. 372, 380; 596 N.W.2d 153 (1999). Having found no viable §1983

claim, neither of the courts below had need to consider this alternate basis supporting summary judgment. However, the Petition has ignored this affirmative defense, which precludes the relief she seeks in her Petition.

Federal courts honor the res judicata effects of state court judgments under the full faith and credit statute, 28 U.S.C. §1738. To that end, the preclusive effect of a prior state court judgment is governed by the law of that state. Michigan law applies the broad rule of res judicata, which precludes "a subsequent litigation based upon the same transaction or events. . . ." *Pierson Sand and Gravel, supra.*, 460 Mich., 380, 596 N.W.2d, 157 . "The test for determining whether two claims arise out of the same transaction and are identical for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the two actions." *Jones v. State Farm Mutual Auto Ins. Co.*, 202 Mich. App. 393, 401; 509 N.W.2d 824, 834 (1994). Further, in Michigan, "[r]es judicata applies when (1) the prior action was decided on the merits, (2) the decree in the prior decision was a final decision, (3) both actions involved the same parties or their privies, and (4) the matter in the second case was or could have been resolved in the first." *Ditmore v. Michalik*, 244 Mich. App. 569, 576; 625 N.W.2d 462, 466 (2001). Each of these elements was satisfied in this case, and the same facts and evidence were essential to the maintenance of both actions.

The Petition fails to address this affirmative defense which defeats petitioner's claim.

III. The Sixth Circuit's Decision Does Not Conflict With the Analyses of the Second, Fourth or Ninth Circuits.

Petitioner contends that the Sixth Circuit's application of its danger creation exception, and specifically its analysis of the conduct that constitutes an "affirmative act", is inconsistent with opinions of the Second, Fourth, and Ninth circuits, citing *Kennedy v. City of Ridgefield*, 411 F.3d 1134 (9th Cir. 2006); *Dwares v. City of New York*, 985 F.2d 94 (2nd Cir. 1993), and *Meeker v. Edmundson*, 415 F.3d 317 (4th Cir. 2005).[6] Although not specifically referenced in her Questions Presented, petitioner also cites the Seventh circuit opinion in *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993). However, these decisions are distinguishable on their facts. In *Kennedy, supra.*, 411 F.3d, 1063, the Ninth Circuit found that the state actor had "affirmatively created an actual, particularized danger Kennedy would not otherwise have faced" when he failed to warn that plaintiff's neighbor had been advised of plaintiff's allegations of child molestation. Thus, the state action had, at least, altered the risk presented by the neighbor and deprived plaintiff of the opportunity to take precautions. In *Dwares*, the police increased an existing danger of assaults on individuals exercising their First Amendment rights, while in *Reed*, the police either created or increased the danger that the drunk passenger would drive the

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[6] Perhaps notably, petitioner does not contend that the legal principles enunciated by the Sixth Circuit are in conflict with legal principles enunciated by other circuits, but merely asserts that other circuits would have applied these principles differently. Even were it true, this would not present a compelling question for this Court's review.

car after they removed the sober driver.[7] In the case at bar, the respondents' presence at the scene of the drag race did neither. Likewise, petitioner's citation of *Meeker* is inapposite. *Meeker, supra.*, did not involve application of a rule regarding danger creation liability, but was a direct injury claim, where, as explained by the Fourth Circuit, the defendant state actor had actively employed a private party to violate the plaintiff's constitutional right to be free of malicious corporal punishment. ". . . Meeker's complaint asserts that Coach Edmundson used students as his '*instruments*' to abuse Meeker." 415 F.3d, 322.[8]

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[7] Responding to petitioner's citation of *Dwares, supra.*, and *Reed, supra.*, the Sixth Circuit appropriately noted that "[b]oth cases . . . involved victims who faced little danger before the police intervened and greater peril after the police acted." Pet. App. 16-17.

[8] Indeed, both *Dwares* and *Meeker* are otherwise distinguishable from the case at bar because, whether viewed from a danger creation perspective, or a direct injury analysis, in both cases the state actors had been the direct cause of a constitutional violation by soliciting or encouraging another to engage in conduct that, if engaged in by a state actor, would have been unconstitutional. In *Dwares, supra.*, the police officers encouraged private parties to assault the plaintiff while he was exercising his First Amendment rights. Thus, the officers were directly liable for the First Amendment violation. Likewise, *Meeker, supra.*, concerned the constitutional right to be free from malicious corporal punishment, and the liability of the defendant coach was based on his direct liability for his role in instigating and directing the beating administered by others. In both the *Dwares* and *Meeker* cases, the encouraged conduct was, itself, violative of the plaintiff's constitutional rights, and the state actors had actively employed a private party to accomplish this end on their behalf. In the case at bar, the encouraged conduct was simply drag racing. Nor were the private parties engaged as the alter egos of the officers.

To the extent that the danger creation requirements differ from circuit to circuit, the differences are not meaningful to the circumstances of the case at bar, where petitioner is unable to satisfy the minimum requirement that the conduct of the state actor serve to either create a new danger, or increase the risk of an existing one.

IV. Petitioner Did Not Present or Preserve a "Direct Injury" Claim in the Lower Courts, Which Claim Could Not, in Any Event, Succeed.

In its Opinion, the Sixth Circuit distinguished the circumstances of this case from "direct injury" claims controlled by *County of Sacramento v Lewis*, 523 U.S. 833 (1998):

> * * * Had the officers organized or participated in this race, the issue would cease to turn on whether they were responsible for harm caused by a private actor and would turn instead on whether they had caused the harm themselves. *See County of Sacramento v Lewis*, 523 U.S. 833, 849, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (noting that officers will be liable under the Due Process Clause for injuries caused by "grossly negligent" or "reckless" conduct that "shock[s] the conscience").
>
> Under these circumstances, we would have no reason to determine whether the officers had increased the risk of harm to the victim because they would be *the source* of that risk. Here, however, Jones has not alleged that the officers had anything to do with the organization of the race or that they participated in it. All of which explains why plaintiff has not presented

> this case as one in which the officers directly harmed Denise Jones but rather as one in which they allowed private actors to harm her. * * *
>
> * * *
>
> * * * While we decline to extend the [state created danger] doctrine in this case, nothing in our decision prevents future litigants from arguing what the plaintiff has not argued here – that the alleged actions of the officers converted the private misconduct of the drivers into public misconduct and in the process converted this claim into a direct-injury constitutional claim under the *Lewis*, as opposed to *DeShaney*, line of cases.

Pet. App. 17-18, 25.

In apparent response to this discussion, petitioner now asserts that which was never asserted before – that respondents "participated in the planning and preparation taking place for the illegal drag race" and "actively participated in the illegal drag race". Pet. at 2. To the extent that petitioner seeks now to convert her claim into a direct injury claim under *Lewis*, she has failed to preserve it in either of the courts below. Moreover, and as the Sixth Circuit observed, there are neither allegations nor facts to support such a claim, and plaintiff's reliance on tort principles does not cure this defect or advance her legal position.

As noted in *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992), the Supreme Court has "always been reluctant to expand the concept of substantive due process." However, in recognition of the need to protect the individual from the arbitrary exercise of unrestrained governmental

power, the Court has recognized the existence of both procedural and substantive due process rights. The substantive rights are quite circumscribed, as the Court explained in *Lewis, supra.*, 523 U.S., 846:

> Our cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be "arbitrary in the constitutional sense," *Collins v Harker Heights*, 503 U.S., at 129, thereby recognizing the point made in different circumstances by Chief Justice Marshall, "'that it is *a constitution* we are expounding.'" * * * Thus, in *Collins v Harker Heights*, for example, we said that the Due Process Clause was intended to prevent government officials "' "from abusing [their] power, or employing it as an instrument of oppression."'" * * * [citations omitted]

Of course, the circumstances of the case at bar are not about the exercise of governmental power, but about the failure to exercise such power. Thus, the appropriate analysis is the one arguably provided by *DeShaney, supra.*

Moreover, noting that "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level" (523 U.S., 849), the *Lewis* Court recognized that some lesser standard might apply in some circumstances, but cautioned against simply transforming tortious conduct into unconstitutional conduct, 523 U.S., 848:

> * * * Thus, we have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm. In *Paul v Davis*, 424

> U.S. 693, 701; 96 S.Ct. 1155, 1160-1161; 47 L.Ed.2d 405 (1976), for example, we explained that the Fourteenth Amendment is not a "font of tort law to be superimposed upon whatever systems may already be administered by the States," and in *Daniels v Williams*, 474 U.S., at 332, we reaffirmed the point that "[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." * * *

Thus, as the Court pointed out in *DeShaney*, 489 U.S., 202, "the Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation." Yet, and as evident in petitioner's repeated reference to principles of tort law, that is precisely the effect of the petitioner's argument in this case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: December 13, 2006.

APPENDIX

APPENDIX A

STATE OF MICHIGAN
COURT OF APPEALS

No. 250616
LC No. 01-143011-NI

[Filed April 7, 2005]

DOROTHY JONES, as Personal Representative of the Estate of DENISE MICHELLE JONES, Deceased,
Plaintiff-Appellant,

v

AARON REYNOLDS, MUSTAPHA ATAT, a/k/a CRAZY MOE MUSTAPHA, a/k/a MOE ATAT, and MARSHA DESIREE HUMPHREY,
Defendants,

and

CITY OF LINCOLN PARK, WILLIAM KISH III, JOSEPH LAVIS, DOUGLAS MUNCEY, and MOHAMED NASSER.
Defendants-Appellees.

Before: Talbot, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Plaintiff, Dorothy Jones, personal representative of the estate of Denise Michelle Jones (hereinafter "decedent"), appeals as of right from a default judgment entered against Aaron Reynolds, Mustapha Atat, and Marsha Desiree Humphrey for $25 million.[1] The default judgment was the final order for the proceeding, and plaintiff's appeal is based on the following orders involving defendants Lincoln Park and Lincoln Park Police Officers William Kish III, Joseph Lavis, Douglas Muncey, and Nasser Mohamed[2]; (1) an order only allowing plaintiff to amend its complaint with state claims, denying plaintiff's motion to compel documents, and setting aside a default entered against defendants; (2) an order granting defendants' motion for summary disposition and denying plaintiff's motion for summary disposition; and (3) an order granting Lincoln Park's motion for summary disposition as to plaintiff's original complaint.

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[1] Reynolds and Atat were the drivers of the vehicles involved in the race leading to decedent's death, and Humphrey owned the vehicle driven by Reynolds. On April 28, 2003, Reynolds plead guilty to charges of involuntary manslaughter, failure to stop at the scene of an accident resulting in death or injury, two counts of felonious driving, and one count of drag racing in Wayne County Circuit Court.

[2] Throughout this opinion Lincoln Park, Kish, Lavis, Muncey, and Nasser will collectively be referred to as defendants, singularly Lincoln Park will be referred to by name, and Kish, Lavis, Muncey, and Mohamed will collectively be referred to as "defendant police officers" and individually by name.

I

At approximately 1:45 a.m. on October 8, 2001, defendant police officers drove to the intersection of Fort Street and Outer Drive, and parked at the Lincoln Park Palace Party Store. Reynolds and Atat had met to drag race and wagers had been made. From the Lincoln Park Palace Party Store defendant police officers observed a large group of people who had gathered across Outer Drive in Detroit. Plaintiff alleges that defendant police officers played rap music over their patrol car's public address system to encourage a drag race, indicated that they would not arrest anyone, and gave the "go ahead" for the race. Reynolds and Atat started northbound on Fort Street. The car driven by Reynolds veered and fatally struck decedent, severing her leg, and injured two other bystanders.

Plaintiff filed a complaint against Reynolds, Humphrey, Atat, and defendants. The circuit court entered some orders staying the proceedings due to the criminal proceedings against defendant police officers.[3] On March 28, 2003, after a hearing, the circuit court granted summary disposition in favor of Lincoln Park, finding that defendant police officers were not the proximate cause of decedent's injuries, as proximate cause is defined in *Robinson v City of Detroit*, 463 Mich 439, 613 NW2d 307 (2000). But the circuit court granted plaintiff's motion to file an amended complaint.

Plaintiff filed its first amended complaint alleging in part: (1) that defendants should be liable for conspiracy to violate

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[3] On March 3, 2003, Officers, Nasser, Muncey, and Lavis entered a plea of no contest to neglect of duty, and all charges were dismissed against Kish.

MCL 257.626a (the drag racing statute); (2) that defendant police officers should be liable under MCL 691.1407(2)(C); (3) defendants were liable for common law gross negligence based on the wanton and willful conduct of defendant police officers; (4) Lincoln Park was liable under MCL 691.1405; (5) defendants were liable for federal constitutional violations under 42 USC 1983; and (6) defendants were liable for nuisance per se. At a hearing, the circuit court informed plaintiff there could not be any federal claims in the amended complaint because of time issues, thus, restricting the amended complaint. Subsequently, the trial court ordered that: (1) plaintiff be permitted to file an amended complaint alleging state law claims against defendants; (2) plaintiff's federal claims be stricken and withheld from filing until the state claims are heard; (3) the defaults entered against defendants be set aside; and (4) plaintiff's motion to compel Lincoln Park to produce documents and things is denied. Plaintiff filed an amended complaint per the circuit court order to only include state law claims, which changed the last complaint only by removing the federal claims. Another hearing was conducted on a motion for summary disposition filed by defendants' and plaintiff. The circuit court did not think that nuisance per se was one of the exceptions to governmental immunity and again noted that defendant police officers were not the proximate cause of decedent's injuries, thus, granted defendants' motion for summary disposition and denied plaintiff's motion for summary disposition.

II

Plaintiff argues, on appeal, that governmental immunity under MCL 691.1407(2)(c), as interpreted by *Robinson*, *supra*, illegally provides immunity to government employees giving them a vehicle to conspire to immunize themselves. We disagree.

Plaintiff failed to present this issue to the trial court. Generally, constitutional challenges to a statute may not be raised for the first time on appeal. *Brookdale Cemetery Ass'n v Lewis*, 342 Mich 14, 18; 69 NW2d 176 (1955); *Lumber Village, Inc v Siegler*, 135 Mich App 685, 692; 355 NW2d 654 (1984). In addition, plaintiff has not properly presented the issue on appeal. It is difficult to ascertain what plaintiff's exact argument is with regard to this issue. Seemingly, plaintiff is challenging the constitutionality of the Michigan Supreme Court's interpretation of the governmental immunity statute in *Robinson*, *supra*, because it does not account for conspiracy like 42 USC 1985.[4] Plaintiff provides no support for why Michigan's governmental immunity statute must take conspiracy into account. To properly present an appeal, an appellant must appropriately argue the merits of the issues she identifies in her statement of the questions involved. *Richmond Twp v Erbes*, 192 Mich App 210, 220; 489 NW2d 504 (1992), overruled in part on other grounds in *Bechtold v Morris*, 443 Mich 105; 503 NW2d 654 (1993). The appellant may not merely announce her position and leave it to this Court to discover and rationalize the basis for her claims, *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Ambs v Kalamazoo County Road Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003), nor may she give issues cursory

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[4] "In order to establish a claim under 42 USC 1985(3) plaintiffs must prove: (1) the existence of a conspiracy, (2) intent to deny plaintiffs the equal protection of the laws or of equal privileges and immunities under the laws, (3) injury or deprivation of a federally protected right of plaintiffs, (4) an overt act in furtherance of the object of the conspiracy, and (5) some racial or other class-based invidiously discriminatory animus behind the conspirators' actions." *Mitchell v Cole*, 176 Mich App 200; 439 NW2d 319 (1989) citing *Griffin v Breckenridge*, 403 US 88, 102-103; 91 S Ct 1790; 29 L Ed 2d 338 (1971).

treatment with little or no citations of supporting authority, *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984), *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). Argument must be supported by citation to appropriate authority or policy. MCR 7.212(C)(7), *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). An appellant's failure to properly address the merits of her assertion of error constitutes abandonment of the issue. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Thus, plaintiff has abandoned this issue on appeal.

Nonetheless, this argument is without merit. This Court and the Michigan Supreme Court have found that MCL 691.1407 is not unconstitutional on numerous occasions, *McCann v State of Michigan*, 398 Mich 65, 77, 80; 247 NW2d 521 (1976), Ryan, J., concurring; *Pittman v City of Taylor*, 398 Mich 41; 247 NW2d 512 (1976); *Allen v Dep't of Mental Health*, 79 Mich App 170; 261 NW2d 247 (1977); *Wojtasinski v Saginaw*, 74 Mich App 476, 254 NW2d 71 (1977). Michigan's governmental immunity statute is not in conflict with 42 USC 1985, and Michigan's governmental immunity statutes does not prevent plaintiff from bringing a federal 42 USC 1985 claim, instead, only limits plaintiff's ability to bring state tort claims. See *Borg-Warner Acceptance Corp v Dep't of State*, 433 Mich 16, 19; 444 NW2d 786 (1989); *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 647-648; 363 NW2d 641 (1984). Plaintiff may bring suit against a municipality pursuant to 42 USC 1985, thus, plaintiff's contention is without merit. See *Jones v Powell*, 462 Mich 329, 336-337; 612 NW2d 423 (2000).

Plaintiff's remaining contentions seem to be based on policy. Where the language of a statute is clear, it is not the

role of the judiciary to second-guess a legislative policy choice; a court's constitutional obligation is to interpret, not rewrite, the law. See *Hanson v Bd of Co Rd Comm'rs of Mecosta Co*, 465 Mich 492, 504; 638 NW2d 396 (2002). A court's function in interpreting a statute is not "to independently assess what would be most fair or just or best public policy," but "to discern the intent of the Legislature from the language of the statute it enacts." *Id.* The Supreme Court has clarified how MCL 691.1407 is to be applied in *Robinson*, *supra*, and this Court is bound to follow our Supreme Court's decisions. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993); *Lopez v General Motors Corp*, 224 Mich App 618, 630; 569 NW2d 861 (1997). For the above reasons, plaintiff has not properly presented this argument on appeal and the argument is without merit.

III

Plaintiff's next issue on appeal is that the trial court erred in granting defendants' motions for summary disposition pursuant to governmental immunity and denying plaintiff's motion for summary disposition where defendant police officers were grossly negligent and the proximate cause of decedent's injuries. We disagree.

A. Standard of Review

This Court reviews decisions on motions for summary disposition de novo. *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 685; 684 NW2d 711 (2004). Apparently, the circuit court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7), which permits summary disposition where a claim is barred by governmental immunity. In evaluating whether summary

disposition should have been granted under MCR 2.116(C)(7), this Court "considers all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001); MCR 2.116(G)(5). Summary disposition should not be granted unless no factual development could provide a basis for recovery. *Simmons v Apex Drug Stores*, 201 Mich App 250, 252; 506 NW2d 562 (1993).

Plaintiff's cross motion requested summary disposition pursuant to MCR 2.116(C)(9) and (10). MCR 2.116(C)(9) provides that a motion for summary disposition may be raised on the ground that the opposing party has failed to state a valid defense to the claim asserted against him. The motion tests the sufficiency of a defendant's pleadings alone, and all well-pled allegations are accepted as true. *Allstate Ins Co v Morton*, 254 Mich App 418, 421; 657 NW2d 181 (2002). Summary disposition is proper if the defenses are so clearly untenable as a matter of law that no factual development could possibly deny a plaintiff's right to recovery. *Id.* at 421. Under MCR 2.116(C)(10), a party may move for dismissal of a claim based on the assertion that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. The motion tests the factual support for a claim, and when reviewing the motion, the court must consider all of the documentary evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

B. Proximate Cause

The circuit court granted defendants' motions for summary disposition and denied plaintiff's motion for summary disposition finding that defendants were immune under MCL 691.1407 because defendant police officers' conduct was not the proximate cause of decedent's injuries. We find that summary disposition was properly entered in favor of defendants based on governmental immunity under MCL 691.1407(2) because defendant police officers were not "the" proximate cause of decedent's injuries. Because defendants stated a valid defense and plaintiff is not entitled to judgment as a matter of law, plaintiff's motion for summary disposition was properly denied pursuant to MCR 2.116(C)(9) and (10).

MCL 691.1407(2) provides:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service . . . if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.

> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Whether a governmental employee was acting within the course of his employment depends on the existence of an employment relationship and the circumstances of the work environment created by the relationship, including the temporal and spatial boundaries established. *Backus v Kauffman (On Rehearing)*, 238 Mich App 402, 407-409; 605 NW2d 690 (1999). And, whether the employee was acting within the scope of his authority depends on the reasonable power delegated to him to accomplish the business of his employer under the circumstances. *Id.*

There appears to be no dispute that defendant police officers were within the course of their employment and within the scope of their authority. The dispute is whether defendant police officers were the proximate cause of decedent's injuries. The circuit court granted summary disposition finding that defendant police officers were not the proximate cause of decedent's injuries and death. Plaintiff argues that the gross negligence of defendant police officers was the proximate cause of decedent's injuries because it was part of a chain that was not broken.

Governmental employees are immune from liability for injuries they cause during the course of their employment if they are acting within the scope of their authority, if they are engaged in the discharge of a governmental function, and if their "conduct does not amount to gross negligence that is the

proximate cause of the injury or damage." *Robinson*, *supra*, at 462. To be the proximate cause of an injury, gross negligence of a government employee that subjects him to liability must be "the one must immediate, efficient and direct cause" preceding the injury. *Id.*; *Tarlea v Crabtree*, 263 Mich App 80, 92; 687 NW2d 333 (2004) (finding that the defendants' conduct was not the proximate cause of the plaintiff's death due in part to heat stroke where the plaintiff had the option to not participate in a football-camp run or to stop and rest during the run). In *Robinson*, *supra* at 462, our Supreme Court provided:

> [R]ecognizing that "the" is a definite article, and "cause" is a singular noun, it is clear that the phrase "the proximate cause" contemplates *one* cause. Yet, meaning must also be given to the adjective "proximate" when juxtaposed between "the" and "cause" as it is here. We are helped by the fact that this Court long ago defined "the proximate cause" as "the immediate efficient, direct cause preceding the injury." *Stoll v Laubengayer*, 174 Mich 701, 706; 104 NW 532 (1913). The Legislature has nowhere abrogated this, and thus we conclude that in MCL 691.1407(2)(c); MSA 3.996(107)(2)(c) the Legislature provided tort immunity for employees of governmental agencies unless the employee's conduct amounts to gross negligence that is the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate cause.

Reynolds and Atat were racing vehicles and accelerating at a high speed when the vehicle driven by Reynolds veered off into a crowd of onlookers and hit decedent, severing her leg, causing her to bleed to death. In a light most favorable to plaintiff, defendant police officers sanctioned and condoned

the race and played rap music over the public address system of their police vehicles to encourage a competitive atmosphere. Plaintiff argues that defendant police officers' overt actions were the proximate cause because the race would not have occurred but for defendant police officers' overt actions, which were all a part of one chain of events.

Applying the *Robinson* standard, in this case, the impact of the vehicle driven by Reynolds with decedent's body was "the one most immediate, efficient and direct cause" of decedent's injuries and death. See *Curtis v Flint*, 253 Mich App 555, 563; 655 NW2d 791 (2002). Clearly, the one most immediate, efficient, and direct cause of decedent's death was Reynolds' vehicle striking decedent. Defendant police officers' conduct, assuming gross negligence, while a cause of decedent's death, it was but one cause, and was therefore, not "the one most immediate, efficient, and direct cause" as required by *Robinson*. *Id*. The second most direct cause would be decedent gathering at the particular location. Even if plaintiff had established the necessary level of negligence, the claims against defendant police officers were factually insufficient to overcome immunity because defendant police officers were not the proximate cause of decedent's injuries or death. See *Curtis*, *supra* at 563. As such, Lincoln Park is not vicariously liable.

For the above reasons, the circuit court did not err in granting defendants' motion for summary disposition based on the fact that defendants were not "the" proximate cause of decedent's death, and denying plaintiff's motion for summary disposition when defendants stated valid defenses and plaintiff was not entitled to judgment as a matter of law. Because the alleged actions and inactions of defendant police officers were not "the" proximate cause of decedent's injuries or death, it

is unnecessary to address whether defendant police officers were grossly negligent. See *Robinson*, *supra*.

C. Willful and Wanton Misconduct

Plaintiff also argues that she has alleged willful and wanton misconduct in addition to gross negligence, and that in order to establish a claim only needs to show that defendant police officers were "a" proximate cause. However, plaintiff has provided no relevant support for this argument and we have found no support for the argument.

Plaintiff does not raise the willful or wanton issue in the statement of questions presented. The appellant must identify her issues in her brief in the statement of questions presented. MCR 7.212(C)(5), *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999). Ordinarily, no point will be considered which is not set forth in the statement of questions presented. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). Further, plaintiff has not presented any support for the contention that willful and wanton conduct is an exception from governmental immunity that only requires a showing of "a" proximate cause. Plaintiff cites *Gibbard v Cursan*, 225 Mich 311; 196 NW 328 (1923) (nongovernmental negligence case describing instructions for contributory negligence) and *Burnett v Adrian*, 414 Mich 448; 326 NW2d 810 (1982) (regarding a recreational use law that authorized recovery for gross negligence or will and wanton conduct), neither applying willful misconduct as an exception to governmental immunity. To properly present an appeal, an appellant must appropriately argue the merits of the issues she identifies in her statement of the questions involved. *Richmond Twp*, *supra* at 220. The appellant may not merely announce her position and leave it to this Court to discover

and rationalize the basis for her claims, *Wilson*, *supra* at 243; *Ambs*, *supra* at 650, nor may she give issues cursory treatment with little or no citation of supporting authority, *Goolsby*, *supra* at 655 n 1; *Silver Creek Twp*, *supra* at 99. Argument must be supported by citation to appropriate authority or policy. MCR 7.212(C)(7), *Peterson Novelties, Inc*, *supra* at 14. An appellant's failure to properly address the merits of her assertion of error constitutes abandonment of the issue. *Yee*, *supra* at 406.

Regardless, we have found no authority supporting plaintiff's contention that when willful and wanton conduct is involved defendants only need to be "a" proximate cause. We have found no such exception to governmental immunity. To the contrary, in *Young v Robin*, 122 Mich App 84, 87; 329 NW2d 430 (1982), this Court held that "We need not address the defendants' contention that the trial court erred in finding that there existed a genuine issue of fact as to whether the state troopers were guilty of willful and wanton misconduct, since conduct falling short of an intentionally wrongful act is not an exception to governmental immunity." Thus, this claim was not even a valid exception to governmental immunity prior to the July 1986 amendments to MCL 691.1407. See *Sudul v Hamtramck*, 221 Mich App 455, 458 (Corrigan, J.), 480-481 (Murphy, J.); 562 NW2d 478 (1997).

We find that plaintiff has abandoned her argument with regard to willful and wanton conduct, and the argument is without merit.

D. Nuisance Per Se

Plaintiff contends that her motion for summary disposition should have been granted and Lincoln Park's denied based on nuisance per se. The circuit court found that Lincoln Park

was immune from a nuisance per se claim. We find that plaintiff has failed to present a question of fact constituting a nuisance per se because a car racing is not a nuisance at all times, without regard to the care with which it is conducted.

Generally, governmental agencies are granted statutory immunity from tort liability unless otherwise provided in the act. MCL 691.1401 et seq; see also *Haaksma v Grand Rapids*, 247 Mich App 44, 52; 634 NW2d 390 (2001). However, it is not clear whether nuisance per se is firmly recognized as an exception to governmental immunity. See *(Li v Feldt After Second Remand)*, 439 Mich 457, 477; 487 NW2d 127 (1992), overruled on other grounds by *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002) (where the Supreme Court commented that "regardless of whether nuisance per se might qualify as an exception to governmental immunity," the plaintiffs in the cases before it did not present nuisance per se claims); *McDowell v Detroit*, 264 Mich App 337, 346-347; 690 NW2d (2004). Nonetheless, even if nuisance per se is a recognized exception plaintiff has, nevertheless, failed to establish facts amounting to a nuisance per se.

This Court in *McDowell*, *supra*, recently provided the following with regard to nuisance per se:

> "[A] nuisance per se is an activity or condition which constitutes a nuisance at all times and under all circumstances, without regard to the care with which it is conducted or maintained." *Li v Feldt (After Second Remand)*, 439 Mich 457, 476-477; 487 NW2d 127 (1992)(opinion by Cavanagh, C.J.). In order to meet the definition of a nuisance per se, the condition must be unreasonable by its very nature and must not be predicated on a lack of case. *Id.* at 477. Pursuant

> to this definition, our Supreme Court has stated that neither an improperly timed traffic light nor the maintenance of a holding pond could be considered "an intrinsically unreasonably or dangerous activity, without regard for care or circumstances . . . [because] both activities serve obvious and beneficial public purposes and are clearly capable of being conducted in such a way as not to pose any nuisance at all." *Id.*

A nuisance per se is not predicated on the want of care, but is unreasonable by its very nature. *Li*, *supra* at 477.

In the present case, a drag race was at issue. Plaintiff relies upon the following deposition testimony of Lincoln Park Police Chief Kish:

> *Q*. If the facts show in this case that there were two Mustangs that were designed for drag racing, propelled by nitrous oxide, on a public street, would you consider that to be a dangerous activity at all times, under any circumstances?
>
> *A*. Yes.
>
> *Q*. Similarly, using those types of vehicles on a public street that I've described, would you consider that to be an inherently dangerous activity?
>
> *A*. Yes.
>
> * * *
>
> *Q*. Would you agree that drag racing two Mustangs modified to consume nitrous oxide, as the

> evidence will show in this case, on a public street, is an intrinsically unreasonably dangerous activity without regard for care or circumstances?
>
> *A.* Yes.

* * *

Plaintiff contends that Lincoln Park, based on the testimony of Chief Kish, acknowledges that drag racing is a nuisance per se.

We find that a nuisance per se does not exist in this case. Plaintiff contends that a nuisance per se exists because "conducting a race on October 7, 2001, at approximately 1:30 A.M., in the morning, when most people are presumably asleep, this 'drag race' activity being conducted on a public [s]treet, in a residential neighborhood," and then listed other factors specific to the race. Certainly, driving and racing can be conducted in a manner that is safe. Under the present circumstances the race was not conducted in a safe manner, but races are conducted professionally all of the time and are maintained and conducted in a manner that is not a nuisance under all circumstances. This Court is to review the activity to determine if it is a nuisance at all times no matter the care or how it is maintained. A race certainly can be envisioned which is not a nuisance and can be conducted and maintained in a manner that does not cause a nuisance. Plaintiff's claim is predicated on lack of care. And, racing is not an intrinsically unreasonable or dangerous activity. The questioning of Chief Kish in the deposition presents a question based on a specific situation in which proper care may not have been taken. In addition, Chief Kish would not be able to make legal conclusions as to what a nuisance per se is. Racing is not "an intrinsically unreasonable or dangerous

activity." *Li, supra* at 477 (opinion by Cavanagh, C.J.). Obviously with proper care and concern, racing can be conducted in a manner that does not pose a nuisance at all times and under all circumstances.

For the above reasons, plaintiff has failed to present a question of fact constituting a nuisance per se because a car racing is not a nuisance at all times, without regard to the care with which it is conducted, thus, the circuit court properly granted Lincoln Park's motion for summary disposition[5] and denied plaintiff's motion for summary disposition.

E. Motor Vehicle Exception to Governmental Immunity

Plaintiff's next argues that the trial court erred in granting Lincoln Park's motion for summary disposition pursuant to MCL 691.1405 and denying plaintiff's motion for summary disposition where Lincoln Park was not entitled to governmental immunity because of the motor vehicle exception to governmental immunity. We disagree. The determination whether a vehicle is a motor vehicle within the scope of the exception to governmental immunity is an issue of statutory construction subject to de novo consideration on appeal. *Stanton v Battle Creek*, 466 Mich 611, 614-615; 647 NW2d 508 (2002).

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[5] Even if the circuit court improperly decided the motion based on governmental immunity (as it indicated that governmental immunity did not provide an exception for nuisance per se, which is not clear), "[a] trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v Michigan Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

The trial court properly granted Lincoln Park's motion for summary disposition and denied plaintiff's motion for summary disposition because the Lincoln Park police vehicles were not being operated within the meaning of MCL 691.1405; i.e., decedent's injuries and death were not directly associated with the operation of the Lincoln Park police vehicles.

The motor vehicle exception of the governmental immunity act, MCL 691.1405, provides:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948.

Plaintiff contends that Lincoln Park's answer to her requests for admissions establishes that defendant police officers' vehicles were operated in a manner excepting Lincoln Park from governmental immunity. Lincoln Park in its answers to plaintiff's requests for admissions, admitted that defendant police officers operated and occupied Lincoln Park vehicles during the drag race, these vehicles were parked at a Lincoln Park party store near the drag race, and that defendant officers were within the scope of their employment during the drag race. Plaintiff argues that Lincoln Park police cars hyped the crowd and that, although the lights were off, the engines were running. Plaintiff also argues that the police vehicles were being operated in violation of the drag racing statute MCL 257.626a because the vehicles were rendering assistance to the race. Plaintiff relying on *Nolan v Bronson*,

185 Mich App 162; 460 NW2d 284 (1990), argues that the vehicle does not have to be moving and can support application of governmental immunity under the current facts because all that is necessary is that the vehicle is "'being used or employed in some function or to produce some desired work or effect.'" *Nolan*, *supra* at 177.

Recently, in addressing nearly the exact same argument in *Poppen v Tovey*, 256 Mich App 351, 355-356; 664 NW2d 269 (2003), this Court provided:

> Citing *Wells v Dep't of Corrections*, 79 Mich App 166; 261 NW2d 245 (1977) and *Nolan v Bronson*, 185 Mich App 163; 460 NW2d 284 (1990), plaintiff argues that for purposes of the motor-vehicle exception it is not necessary that a vehicle be in motion at the time of the injury to find that the injury resulted from "operation" of a motor vehicle. Rather, all that is necessary is that the vehicle is "'being used or employed in some specific function or to produce some desired work or effect.'" *Nolan*, 185 Mich App at 177, quoting *Wells*, 79 Mich App at 169. Our Supreme Court, however, recently rejected this expansive definition of "operation" in *Chandler v Muskegon Co*, 467 Mich 315; 652 NW2d 224 (2002), determining that such a construction defines the term "so broadly that it could apply to virtually any situation imaginable in which a motor vehicle is involved regardless of the nature of its involvement." *Id.* at 321. Noting the well-established principle that the statutory exceptions to governmental immunity must be narrowly construed, the Court concluded that the phrase "'operation of a motor vehicle' means that the motor vehicle is being operated as a motor vehicle" and, therefore, encompasses only those

> "activities that are directly associated with the driving of a motor vehicle." *Id.* at 320-321 (emphasis in original). Applying this definition to the undisputed facts of this case, we find no error in the trial court's conclusion that plaintiff's injuries did not result from "operation" of a government-owned motor vehicle. At the time of the collision, the city vehicle had been stopped for approximately three to five minutes in order to permit its passenger to inspect a public utility. Once stopped for this purpose, its presence on the road was no longer "directly associated with the driving of that vehicle. *Id.* at 321. Accordingly, the vehicle was not being operated "as" a motor vehicle at the time of the accident and summary disposition in favor of the city was appropriate.

Thus, the mere involvement of a motor vehicle is not sufficient to abrogate immunity. Rather, the negligent operation of a vehicle requires that the motor vehicle was being operated as a motor vehicle, and the exception encompasses only activities which are directly associated with the driving of a motor vehicle. See *Chandler*, *supra* at 320-32; *Poppen*, *supra* at 355. To result from the negligent operation of a motor vehicle, generally an injury must result from physical contact between the governmental-owed vehicle and the plaintiff's vehicle, or from circumstances in which the government-owned vehicle physically forced the plaintiff's vehicle off the road or into another object. See *Robinson*, *supra* at 457; *Curtis*, *supra* at 559.

Clearly, the Lincoln Park vehicles were not being operated "as a motor vehicle," as statutorily defined and interpreted by this Court and the Supreme Court. It is undisputed the vehicles were not moving, and, at most, were being used through their public address systems. There was

no physical contact between decedent and the Lincoln Park police vehicles; nor was any activity of the Lincoln Park police vehicles directly associates with the driving of a motor vehicle. The circuit court properly granted Lincoln Park's motion for summary disposition in this regard and properly denied plaintiff's motion for summary disposition because decedent's injuries did not result from the negligent operation of Lincoln Park police vehicles.

IV

Plaintiff next contends, on appeal, that the trial court abused its discretion by setting aside the entry of default against defendants. We disagree.

A. Standard of Review

The application and construction of court rules is an issue of law subject to de novo review. *Barclay v Crown Bldg & Development, Inc*, 241 Mich App 639, 642; 617 NW2d 373 (2000). Whether a default or a default judgment should be set aside is within the sound discretion of the trial court, and this Court reviews a trial court's decision to set aside a default or default judgment for a clear abuse of discretion. *Amoco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 97; 666 NW2d 623 (2003). "An abuse of discretion involves far more than a difference in judicial opinion." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). A trial court abuses its discretion when "the result is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias.'" *Id.*, quoting *Marrs v Bd of Medicine*, 422 Mich 688, 694; 375 NW2d 321 (1985). Where there has

been a valid exercise of discretion, appellate review is sharply limited. *Id.*

B. Setting Aside a Default

Plaintiff contends that defendants never filed answers to plaintiff's amended complaint filed on March 31, 2003 or at least did not answer within the proper time period established by the fact that the default needed to be set aside. Plaintiff further contends that the trial court abused its discretion in setting aside the default. We find that the circuit court did not clearly abuse its discretion in setting aside the default entered against defendants.

A motion to set aside a default or a default judgment generally may be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1); *Alken-Ziegler, supra* at 223. Whether a party has made a sufficient showing of good cause and of a meritorious defense are discrete inquiries, but the strength of a proffered meritorious defense can affect the necessary showing of good cause. *Alken-Ziegler, supra* at 232-233. Good cause sufficient to warrant setting aside a default or a default judgment may be shown by: (1) a substantial irregularity or defect was present in the proceeding on which the default is based; or (2) there was a reasonable excuse for failure to comply with the requirements that created the default. *Id.* at 233; see also *Amoco Builders & Developers, Inc, supra.* A substantial defect or irregularity must have prejudiced the defendant to constitute good cause. *Alycekay Co v Hasko Construction Co*, 180 Mich App 502, 506-507; 448 NW2d 43 (1989); *Emmons v Emmons*, 136 Mich App 157, 164-165; 355 NW2d 898 (1984). The policy of this state generally favors the meritorious determination of issues, but once regularly entered, default judgments should stand after

expiration of the time provided. *Amco Builders & Developers, Inc, supra* at 95; *Alken-Ziegler, supra* at 227; *Koski v Allstate Ins Co*, 456 Mich 439, 447; 572 NW2d 636 (1998); *Wendel v Swanberg*, 384 Mich 468, 476; 185 NW2d 348 (1971).

1. Defendant Police Officers

Plaintiff filed an amended complaint on March 31, 2003. On April 17, 2003, defendant police officers filed a motion to set aside the order granting leave to amend complaint and to strike the amended complaint. MCR 2.603 provides for entry of a default "[if] a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules." Plaintiff entered the default based on defendants' failure to comply with MCR 2.108. MCR 2.108(A)(1) provides: "A defendant must serve and file an answer or take other action permitted by law or these rules within 21 days after being served with the summons and a copy of the complaint in Michigan in the manner provided in MCR 2.108(A)(1)." MCR 2.108(B) provides: "A motion raising a defense or an objection to a pleading must be served and filed within the time for filing the responsive pleading or, if no responsive pleading is required, within 21 days after service of the pleading to which the motion is directed." MCR 2.108(C)(3) provides: "The response to a supplemental pleading or to a pleading amended either as of right or by leave of court must be served and filed within the time remaining for response to the original pleading or within 21 days after service of the supplemental or amended pleading, whichever period is longer."

Defendant police officers filed the motion to strike the amended complaint and motion to set aside the amended complaint within the proper time period pursuant to MCR

2.108(B), and this is consistent with the "otherwise defend" language of MCR 2.603, thus, entry of the default was improper. In *Alken-Ziegler*, *supra* at 229, our Supreme Court noted:

> . . . although the law favors the determination of claims on the merits, . . . it also has been said that the policy of this state is generally against setting aside defaults and default judgments that have been *properly entered*. [Citations omitted and emphasis added.]

Thus, the policy is not against setting aside defaults that have not been properly entered. Defendant police officers did *otherwise defend*, thus, entry of the default was improper. Nonetheless, even if the default was properly entered, the circuit court did not clearly abuse its discretion in setting aside the default against defendant police officers.

Defendant police officers' motion and objection to the amended pleading and the record support that there were substantial procedural irregularities, thus, defendant police officers have shown "good cause." On March 14, 2003, plaintiff brought a motion for leave to file an amended complaint and attached the amended complaint. Subsequently, on March 27, 2003, defendant police officers filed a motion for summary disposition contending that summary disposition was proper on plaintiff's original complaint and the proposed first amended complaint attached to the March 14, 2003, motion to amend. On March 28, 2003, there was a hearing on Lincoln Park's motion for summary disposition and the circuit court indicated that plaintiff could file the amended complaint. Then, on March 31, 2003, plaintiff filed the first amended complaint, which differed from the amended complaint presented at the hearing. The amended complaint also contained claims that the circuit

court had already granted summary disposition on and federal claims which were later stricken. Further, defendant police officers provided plaintiff with a meritorious defense before the first amended complaint filed, which also supported a complete defense for defendant police officers for the claims in the amended complaint (noting that the federal claims were stricken from her first amended complaint). Moreover, defendant acknowledged at the April 25, 2003 hearing that there were no new state claims against defendant police officers in the amended complaint, and the federal claims were stricken. Thus, defendants' response to plaintiff's original complaint addressed all of the claims against defendant police officers that were valid. It is clear defendant police officers' prior response adequately provided a meritorious defense to the amended complaint raising no new proper claims against defendant police officers.[6]

Even, if defendant police officers were somewhat negligent, "[t]he mere existence of negligence does not preclude a finding of good cause." *Huggins v Bohman*, 228 Mich App 84, 88, 578 NW2d 326 (1998). Indeed, the first of

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[6] A specific affidavit of meritorious defense is not required when it is clear from the record that defendants had presented a meritorious defense. See *ISB Sales Co*, *supra* at 533-544; *Jones v Philip Atkins Construction Co*, 143 Mich App 150, 161; 371 NW2d 508 (1985); see also *Hertz Schram & Saretsky v Turner*, unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 239176, issued January 20, 2004); *Francis v Yelle*, unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 237406, issued May 29, 2003). We note these unpublished opinion as persuasive, because of the limited case law, but notes that unpublished opinions are not binding under the rules of stare decisis. MCR 7.215(C)(1); see also *Dyball v Lennox*, 260 Mich App 698. 705 n 1; 680 NW2d 522 (2003).

the five specific grounds for providing relief from a judgment is "mistake, inadvertence, surprise, or excusable neglect . . . ." MCR 2.612(C)(1)(a). Defaults and default judgments may also be set aside under the standards of MCR 2.612, pertaining to relief from judgment. MCR 2.603(D)(3); *Alken-Ziegle*, *supra* at 234 n 7. As noted, "[a] showing of a meritorious defense and factual issues for trial can fulfill the 'good cause' requirement because in some situations, allowing such a default to stand would result in manifest injustice." *Huggins*, *supra* at 88, citing *Park v American Casualty Ins Co*, 219 Mich App 62, 67; 555 NW2d 720 (1996). Finally, relief from judgment rule authorizes relief for "any other reason justifying relief from the operation of judgment." MCR 2.612(C)(1)(f). This catchall provision grants a trial court wide discretion to set aside a default if it determines that manifest injustice might flow from the entry of a default judgment.

For the above reasons, we find that the trial court did not commit a clear abuse of discretion in setting aside the default entered against defendant police officers.

2. Lincoln Park

Although, a closer question, the circuit court did not clearly abuse its discretion in setting aside the default entered against Lincoln Park.

At a March 28, 2003 hearing the circuit court indicated that it was granting Lincoln Park's motion for summary disposition because of governmental immunity. And, the circuit court at this same hearing indicated that plaintiff could amend the complaint. At this hearing, Lincoln Park addressed plaintiff's submitted amended complaint and contended that it did not matter because it was still entitled to

governmental immunity pursuant to *Robinson*, *supra*. There were three versions of the amended complaint presented prior to entry of the default judgment: (1) March 14, 2003, plaintiff presented one version with her motion for leave to amend; (2) on March 28, 2003, at the hearing plaintiff presented another version of the amended complaint and was granted leave to amend; and (3) on March 31, 2003, plaintiff filed yet another version of the amended complaint, which subsequently had claims stricken from it. The amended complaint, filed on March 31, 2003, which Lincoln Park did not respond to, was later found to be improper. On April 25, 2002, a hearing was conducted and it appears that both Lincoln Park and the circuit court were confused as to whether Lincoln Park was still a party to the proceedings, since the circuit court had earlier granted its motion for summary disposition. The new complaint contained the former allegations that the circuit court had already granted summary disposition on and new claims for nuisance per se and federal claims. There were questions throughout the hearing regarding the filing of the complaint. The circuit court ordered that the federal law claims contained in the amended complaint were to be stricken and for plaintiff to file another amended complaint without the federal claims.

The was a substantial number of irregularities and defects in the proceedings below regarding plaintiff's amended complaint; thus, there was "good cause" to set aside the default against Lincoln Park. *Alken-Ziegler*, *supra* at 233; *Barclay*, *supra* at 653. Lincoln Park presented a defense based on governmental immunity in its original pleadings, which carried over to the amended pleadings. These arguments also covered plaintiff's addition of the nuisance per se claim, in which, the complaint itself was lacking because racing is not a nuisance per se. And, Lincoln Park presented a meritorious defense at the hearing where plaintiff argued her

motion to amend when it argued that it was still entitled to governmental immunity on the claims presented in the amended complaint.[7]

Even if Lincoln Park was somewhat negligent, "[t]he mere existence of negligence does not preclude a finding of good cause." *Huggins*, *supra* at 88. Indeed, the first of the five specific grounds for providing relief from a judgment is "mistake, inadvertence, surprise, or excusable neglect . . . ." MCR 2.612(C)(1)(a). Defaults and default judgments may also be set aside under the standards of MCR 2.612, pertaining to relief from judgment. MCR 2.603(D)(3); *Alken-Ziegler*, *supra* at 234 n 7. As noted, "[a] showing of a meritorious defense and factual issues for trial can fulfill the 'good cause' requirement because in some situations, allowing such a default to stand would result in manifest injustice." *Huggins*, *supra* at 88, citing *Park*, *supra* at 67. Finally, the relief from judgment rule authorizes relief for "any other reason justifying relief from the operation of judgment." MCR 2.612(C)(1)(f). This catchall provision grants a trial court wide discretion to set aside a default if it determines that manifest injustice might flow from the entry of a default judgment. Manifest injustice would result if the default was not set aside as Lincoln Park, would be liable to plaintiff for claims for which it is immune.

For the above reasons, it was not a clear abuse of discretion for the circuit court to find that Lincoln Park

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[7] As noted above, a specific affidavit of meritorious defense is not required when it is clear from the record that defendants had presented a meritorious defense. See *ISB Sales Co*, *supra* at 533-544; *Jones*, *supra* at 161; see also *Hertz Schram & Saretsky*, *supra* *v Turner*; *Francis*, *supra*.

satisfied the good cause prong of the analysis, even if it was negligent in responding to the first amended complaint, as it thought it was dismissed from the case. This lesser showing of good cause is sufficient when, as seen in this case, a manifest injustice could result from the default judgment in light of the existence of a meritorious defense. The circuit court's decision to set aside the default was not palpably and grossly violative of fact and logic. See *Alken-Ziegler*, *supra* at 227.

V

Plaintiff next argues, on appeal, that the trial court abused its discretion in denying plaintiff's motion to compel production of relevant documents from Lincoln Park. We disagree.

A. Standard of Review

A motion to compel discovery is a matter within the trial court's discretion, and the court's decision to grant or deny a discovery motion will be reversed only if there has been abuse of that discretion. *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 343; 497 NW2d 585 (1993). In civil cases, an abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transp v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000). Michigan law generally provides for the discovery of any relevant, nonprivileged matter. MCR 2.302(B)(1); *Eyde v Eyde*, 172 Mich App 49, 54-55; 431 NW2d 459 (1988).

B. Motion to Compel Production of Documents

Plaintiff contends that the circuit court abused its discretion in denying plaintiff's motion to compel production of documents against Lincoln Park, particularly, when the original request was submitted before Lincoln Park was dismissed from the case. It does not appear that the circuit court abused its discretion, but, regardless, any error was clearly harmless. Plaintiff's brief on appeal does not specifically address what documents it wanted, but indicated the production of documents were "relevant to find impeachment evidence." However, in granting summary disposition in favor of defendants the circuit court viewed all evidence in a light most favorable to plaintiff, thus, the admission of impeachment evidence would not have changed anything. Consequently, any error was harmless error and plaintiff's substantial rights were not affected. See *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004); *Campbell v Sullins*, 257 Mich App 179, 197; 667 NW2d 887 (2003); MCR 103(a); MCR 2.613(A). As such, even if the circuit court did abuse its discretion (which it does not seem that it did), plaintiff is entitled to no relief on this issue.

VI

Plaintiff's final issue on appeal is that the trial court abused its discretion in striking and withholding from filing the federal civil rights claims where the motion to file an amended complaint was stipulated to and granted by the circuit court. We disagree because the circuit court did not abuse its discretion in restricting plaintiff's first amended complaint to state claims.

A. Standard of Review

This Court reviews a trial court's decision on a motion to amend and a motion to strike for an abuse of discretion. *Frank W Lynch & Co v Flex Techs, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001), *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 5; 687 NW2d 309 (2004); *Phillips v Deihm*, 213 Mich App 389, 394; 541 NW2d 566 (1995).

B. Plaintiff's Federal Claims

Plaintiff contends that the circuit court abused its discretion in restricting her first amended complaint to state claims, thus, striking her 42 USC 1983 claims. Plaintiff sought leave to amend her complaint pursuant to MCR 2.118(A)(2), which provides that "except as provided in subrule (A)(1), a party may amend a pleading only by leave of court or by written consent of the adverse party. Leave shall be freely given when justice so requires." MCR 2.118(A)(2).

Particularized reasons for denying a motion to amend include: (1) undue delay; (2) the movant's bad faith or dilatory motive; (3) repeated failures to cure deficiencies by amendments previously allowed; (4) undue prejudice to the nonmoving party; and (5) futility. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000). Seemingly, the circuit court limited plaintiff's amended complaint to state claims because of time and undue prejudice to defendants' ability to remove the claim to federal court; there was also confusion that was caused by plaintiff presenting three different proposed first amended complaints. The record reflects that the circuit court noted these particularized reasons and seemed to weigh this against the fact that plaintiff would not be prejudiced. There was

confusion surrounding the claims in that the 42 USC 1983 claims were not specifically in the motion to amend plaintiff presented to the circuit court when requesting an amendment.

While it is true that leave to amend shall be freely given when justice so requires, MCR 2.118; *Terhaar v Hoekwater*, 182 Mich App 747, 751; 452 NW2d 905 (1995), the circuit court did not violate this rule in limiting plaintiff's amendment to state claims. Plaintiff's amended complaint filed on March 31, 2003, was different then the one presented in its motion for an amended complaint and the one it presented at the motion hearing. With respect to claims not raised in the motion, but argued at the hearing, these claims were not stated in writing with particularity, and were therefore not properly within the motion to amend the complaint. See MCR 2.119. The circuit court also preserved plaintiff's right to seek to amend to add federal claims once it had ruled on the pending motions for summary disposition or to bring another claim. And, the circuit court's final order was given with the understanding that it reserved adjudication of damages for the pending federal district court claims against defendants. The circuit court did not abuse its discretion in striking plaintiff's federal claims and only allowing the amended complaint to allege state claims, see *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997), citing *Dacon v Transue*, 441 Mich 315, 328; 490 NW2d 369 (1992); *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 658; 213 NW2d 134 (1973), particularly when defendants may have been prejudiced if the federal court claims were allowed and plaintiff suffered no prejudice.

Affirmed.[8]

/s/ Michael J. Talbot
/s/ Kathleen Jansen
/s/ Hilda R. Gage

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[8] Lincoln Park has requested that sanctions be imposed against plaintiff for a vexatious appeal. MCR 7.216(C)(1) governs sanctions requested for a vexatious appeal. MCR 7.216(C)(1) indicates that a motion for sanctions must be filed pursuant to MCR 7.211(C)(8). And MCR 7.211(C)(8) provides that a request for sanctions must be made by motion; a brief on appeal is insufficient to request sanctions. There is no indication that Lincoln Park has separately filed a motion for sanctions at the appellate level. Moreover, no appropriate legal authority was cited to support sanctions. Therefore, Lincoln Park's request for sanctions is denied.

APPENDIX B

Court of Appeals, State of Michigan

Docket No.250616
LC No.01-143011-NI

[Filed June 17, 2005]

Dorothy Jones	)
	)
v	)
	)
Aaron Reynolds	)
	)

ORDER

The Court orders that the motion for reconsideration is DENIED.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

June 17, 2005 /s/ Sandra Schultz Mengel
Date Chief Clerk

APPENDIX C

Michigan Supreme Court
Lansing, Michigan

SC No.: 129133

[Filed February 27, 2006]

DOROTHY JONES, as Personal Representative of the Estate of DENISE MICHELLE JONES, Deceased,
Plaintiff-Appellant,

v

AARON REYNOLDS, MUSTAPHA ATAT, a/k/a CRAZY MOE MUSTAPHA, a/k/a MOE ATAT, and MARSHA DESIREE HUMPHREY,
Defendants,

and

CITY OF LINCOLN PARK, WILLIAM KISH III, JOSEPH LAVIS, DOUGLAS MUNCY, and MOHAMED NASSER,
Defendants-Appellees.

ORDER

On order of the Court, the application for leave to appeal the April 7, 2005 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions should be reviewed by this Court.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 27, 2006 /s/ Corbin R. Davis
Clerk